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IN THE

Supreme Court of the United States

OCTOBER TERM—1952.

No. 462

UNITED HOISTING CO., INC. and LOCAL NO. 15C, INTERNATIONAL UNION OF OPERATING ENGINEERS, A. F. L.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, for the Third Circuit.

EDWARD D. BOLTON,
Counsel for Petitioners.

WILLIAM J. CORCORAN,
Attorney for Local 15C, International Union of Operating Engineers, A. F. L., Petitioner.

HAROLD L. LUXEMBERG,
Attorney for United Hoisting Co., Inc., Petitioner.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Specifications of Errors to Be Urged	7
Reasons for Granting the Writ	8
Conclusion	10
Appendix A—Statutes	11
B—Bulletin Re: Training Program for Board Legal Assistants	14

CITATIONS.

Haleston Drug Stores, Inc. v. NLRB, 187 Fed. 2d 418, 9th Cir., Cert. Denied, 72 S. Ct. 29, 342 U. S. 815	9
H & M Manufacturing Co., Inc., 87 NLRB 1373, Note 4	10
In Re Pure Oil Co., 74 NLRB 1382, Note 1	9
National Electric Products Corp., 80 NLRB 995	9
N. L. R. B. v. Kanmak Mills, Inc., C. A. 3, No. 10,555.	5, 6, 8

STATUTES.

PAGE

Taft-Hartley Law (61 Stat. 136, 29 U. S. C. Supp. I, Sec. 151, et seq.) 11

Administrative Procedure Act (60 Stat. 237, 240, 5 U. S. C. 1001, 1004 (c) 12

Rules and Regulations of the National Labor Relations Board, Rules 201.2 and 20 (13 Fed. Reg. 3090) Rule 101.10 (29 CFR 4 13

References to portions of the record printed in the Appendix to the brief of the Union are designated "R. A."

References to the Appendix of the B are designated "B. A."

IN THE

Supreme Court of the United States

OCTOBER TERM—1952.

No. .....

UNITED HOISTING CO., INC. and LOCAL NO. 150, INTERNATIONAL UNION OF OPERATING ENGINEERS, A. F. L.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, for the Third Circuit.

Petitioners pray that a writ of certiorari issue to review the decree of the United States Court of Appeals, for the Third Circuit, entered in the above entitled case on September 2, 1952.

Opinions Below.

The Trial Examiner's Intermediate Report dated July 13, 1950 (B. A. 79a) and the Decision and Order of the National Labor Relations Board (B. A. 114a-127a) are reported in 92 NLRB 1642. The opinion of the United States Court of Appeals, Third Circuit (R. A. 68) is reported in 198 Fed. 2d 465.

Jurisdiction.

The jurisdiction of this court is invoked under Title 28 USC, Section 1254 (1).

Questions Presented.

(1) Whether the Law Assistant to the Chairman of the National Labor Relations Board may properly prosecute an unfair labor practice proceeding before a Trial Examiner.

(2) Whether the National Labor Relations Board may properly sit in review of a decision of a Trial Examiner involving close questions of fact and law in a proceeding prosecuted by a Law Assistant to one of its members, particularly where no testimony is adduced to determine the status of said prosecutor following the conclusion of the trial when his authority to prosecute was attacked.

(3) Whether the National Labor Relations Board may amend its final decision one year following its issuance without adducing additional evidence upon which it bases its findings that the Prosecutor was transferred to the Staff of the General Counsel from his position as Law Assistant to the Chairman of the National Labor Relations Board, particularly in the light of its explanation before the Court of Appeals that such transfer was limited to the trial of this case and solely to give him experience.

Statutes Involved.

The pertinent statutory provisions are printed in the appendix—*infra*, pages 11-13.

Statement.

The National Labor Relations Board pursuant to Section 10 (e) of the Act, as amended, petitioned the Court of Appeals for enforcement of its order issued against the United Hoisting Co., Inc. and Local 15C, International Union of Operating Engineers, A. F. of L., which order is dated January 26, 1951 and as amended January 9, 1952.

The complaint served upon the Union alleges that on January 14, 1949 it caused the Company to discharge Edwin H. Huegel from its employ upon the failure of Huegel to become a member of the Union. It is alleged that the Union restrained and coerced the employees of the Company in the exercise of their rights under Section 7 of the Act by executing on April 1, 1948 a written addenda amending a written contract entered into on June 18, 1947 which required membership in the Union as a condition of employment. The complaint further alleges that the agreement and amendment thereto have no legal force or effect and are invalid and in violation of the Act.

The Company is engaged in the rental and sale of construction equipment to contractors engaged in the building construction industry and is located in Englewood, New Jersey. The Union is a labor organization intimately connected with the building construction industry in that its members repair and maintain construction equipment, such as cranes, shovels, bulldozers, pumps, and the like. On June 18, 1947, the Union entered into an agreement with the Construction Equipment Rental Association of which the Company is a member, which is General Counsel's Exhibit #3. Article XI which is entitled "Duration" reads as follows:

> "This agreement enters into force on April 1st, 1947, and shall continue in force until changed by

agreement between the parties. No change shall be made prior to December 31st, 1948, and not then unless written notice asking that changes be considered is given by one party to another on or before November 1st, 1948, by registered mail."

On April 1, 1948 an addenda was executed between the contracting parties, General Counsel's Exhibit #4, which modified the agreement of June 18, 1947 to the extent that the hourly wage scale in two particulars was increased. The addenda also provided that no change should be made in the agreement prior to December 31st, 1950 in lieu of the existing requirement which provided for no change prior to December 31, 1948. The addenda further clarified existing provisions of the June 18, 1947 agreement without making any changes therein. It was also agreed between the parties in the addenda that nothing should disturb the presently existing contract dated June 18, 1947 from continuing in full force and effect.

On October 11, 1948, Edwin H. Huegel was hired as a welder by the Company and continued in its employ until January 14, 1949 when he was laid off for lack of work. Three days following his lay off, Huegel filed charges with the Board alleging that his separation was a discriminatory discharge, based upon his failure to join the Union. The Union in its answer denied that the discharge of Huegel was discriminatory and set up an affirmative defense that said Huegel was laid off for cause in accordance with the Company's rules of seniority, because of lack of sufficient work for said employee. The Union set up a second affirmative defense under Section 102 of the Labor Management Relations Act, 1947 in that the agreement of June 18, 1947 was entered into prior to the effective or enactment date of said Act and thus fell within the protection of such Section 102. During the course of the hearing, a third affirmative defense was entered by

the Union under Section 10 (b) of the Act in that the alleged violation of the Act occurred more than six months prior to the serving of the complaint and charges upon the Union.

After the case was tried and the Intermediate Report of the Trial Examiner issued, investigation by counsel for the Union showed that the trial was conducted by Melvin J. Welles, Esq., the Law Assistant to the Chairman of the Board. In a letter dated September 5, 1950, Mr. Louis R. Becker, Acting Executive Secretary of the Board (R. A. 56a) informed the counsel for the Union that Mr. Welles had been employed as a Legal Assistant to one of the Board members since 1947, and that he was detailed to the New York Regional Office from March 27, 1950 to May 1, 1950 for the purpose of acquainting Legal Assistants to Board members with field practice. During the period of one month that Mr. Welles was assigned to the New York office his sole duty was to prosecute the instant case before the Trial Examiner, following which he returned to Washington and presumably resumed his duties as Law Assistant to the Chairman of the Board.

After the decision and order of the Board were issued on January 26, 1951, an order amending this decision and order was issued on January 9, 1952, almost one year later. The Board by its original decision and order found there was no merit to the exception made that the case was tried by a Legal Assistant to one of the Board members, as said Legal Assistant had been transferred to the staff of General Counsel. The amended decision and order struck out this finding in its entirety.

The court below affirmed the decision and order of the Board in 198 Fed. 2d 465.

The court below had occasion to pass upon a similar problem in the case of *N.L.R.B.* v. *Kanmak Mills, Inc.*, C. A. 3, No. 10,555, October 26, 1951 (not otherwise reported) and decided it contrary to the manner in which

it decided the instant case. In the *Kanmak Mills* case, when objection was made before the Court of Appeals that the person who prosecuted the case before the Trial Examiner was still a Law Assistant to Paul M. Herzog, Chairman of the Board, the Court of Appeals, Third Circuit, remanded the case to the Board for the purpose of taking testimony and determining whether the prosecutor participated or advised both in functions of investigation or prosecution and in functions of decision contrary to the prohibition of Section 5 (c) of the Administrative Procedure Act. Accordingly, in that case, the Board issued an order reopening the case and directing a further hearing be held in accordance with the order of remand.

In the instant case, the Court below not only failed to find any violation of the division of duties required under the Taft-Hartley Act, but also declined to remand the case for the purpose of taking testimony to determine the true status of the prosecutor. The Court below described the practice of the Board as "laudable" saying that it "functioned with the highest sense of responsibility for its obligations under the Act."

The Court below has acted in the two cases in which this problem arose before it in diametrically opposite manners. It is an accepted fact that the Taft-Hartley Law in its entirety has been the subject of sincere and profound controversy since its enactment. At least the administration of this Act should be meticulously adhered to in accordance with the intent of the Congress, namely, that there shall be a division between the functions of the Board which acts as a judicial body and those of the General Counsel who acts as a prosecutor. Nevertheless, in the opinion below, the Court of Appeals considered it advisable to state that the Board's patent violation of the Act was laudable, notwithstanding there was no evidence in the record upon which the Court could draw this conclusion. The only explanation offered by

the Board was done by way of a supplemental mimeographed brief consuming over twelve pages of argument to which was attached Bulletin #69, dated December 8, 1949, entitled "Training Program for Board Legal Assistants." A perusal of this Bulletin will show that the training program aforesaid was agreed to by the Board and General Counsel and provided for Law Assistants "to attend" complaint case hearings in addition to assisting Field Examiners or Attorneys conducting various types of investigations, elections, settlement negotiations and enforcement, for thirty to sixty day details in Regional Offices. Nothing contained in said Bulletin provides for the prosecution of trials by said Legal Assistants. The travel and per diem expenses of Legal Assistants under this training program were not to be charged to the Regional Office Allotment Account, but to a special Account in Washington.

Specifications of Errors to Be Urged.

The Court of Appeals erred:

1. In holding that the National Labor Relations Board in assigning the Law Assistant to the Chairman of the National Labor Relations Board to prosecute the instant case before the Trial Examiner did not violate the prohibitions contained in the Taft-Hartley Law and the Administrative Procedure Act.

2. In failing to reverse the decision and order of the Board or in failing to remand the case for the purpose of taking testimony or evidence to demonstrate whether the Law Assistant to the Board Chairman was in fact transferred to the Office of the General Counsel or merely detailed or loaned.

3. In failing to judicially determine whether the Board and General Counsel were empowered under the Act to institute a training program for Board Legal Assistants which had the effect of violating the Taft-Hartley Law.

4. In failing to condemn the practice of the Board in assigning its Law Assistants to try cases as prosecutors in flagrant violation of the Act and the fundamental division and separation of duties under our democratic processes.

5. In affirming the decision and order of the National Labor Relations Board.

Reasons for Granting the Writ.

1. To quiet, cement and unite the two large, opposing segments of the Nation's population of Labor and Management by assuring them that the Taft-Hartley Law is honorably and fairly administered in accordance with the intent of Congress and the fundamental democratic concepts of judicial process.

2. Settlement of the question of assigning Law Assistants to Board members to act as prosecutors in cases involving the Taft-Hartley Law is plainly in the public interest since it is likely to occur again in unfair labor practice proceedings before Trial Examiners throughout the country, many of which are pending at the present time.

3. The decision of the Court below is believed to be erroneous not only on the ground that it violates the letter and spirit of the Taft-Hartley Law, but is contrary to that Court's own decision in the *Kanmak Mills* case, supra, as well as the other cases cited.

4. The failure of the Board to take seriously the mandate of the Congress as outlined in the Taft-Hartley Law to keep separate and apart the division of duties between the Board as a judicial body and the General Counsel as a prosecuting officer, requires this Court to take affirmative action. In the case of *Haleston Drug Stores, Inc.* v. *NLRB*, 187 Fed. 2d, 418,* Certiorari denied 72 S. Ct. 29, 342 U. S. 815, the 9th Circuit Court in speaking of this problem at page 421 said, "The well understood purpose of Congress here was to effect a separation of the prosecution and adjudicating functions within the Board."

A contrary position was taken by the Board at the time Robert N. Denham, Esq., was appointed General Counsel. In the case of *National Electric Products Corp.*, 80 NLRB 995, the Board ruled that the appointment of Mr. Denham who was the Trial Examiner in this case to the position of General Counsel, precluded him from preparing the Intermediate Report, under the provisions of the Administrative Procedure Act. The Board held in that case that an officer who engages in the performance of prosecuting functions, may not participate or advise in a decision or recommended decision of a case.

See also the case of *In Re Pure Oil Co.*, 74 NLRB 1382, Note 1, where the Board held that a hearing officer in a representation proceeding is not disqualified by reason of

*Senator Taft stated this to be the purpose of Sect. (3). He remarked on the fact that in recent years the Board itself had adopted regulations delegating the power of issuing complaints to the various regional directors with leave to a person aggrieved by the refusal of a regional officer to issue a complaint to appeal the matter to Washington. He observed that these appeals, according to testimony of the Chairman of the Board were considered by an anonymous committee of subordinate employees. "What the conference amendment does is simply to transfer this 'vast and unreviewable power' from this anonymous little group to a statutory officer responsible to the president and to the Congress" (93 Cong. Record 6859, June 12, 1947).

Walter Gellhorn, Director of the Attorney General's Committee on Administrative Procedure remarks of the purpose of the separation of these functions: "The opposition to lodging in one agency, the authority both to institute and to adjudicate proceedings rests on a simply stated thesis: one who resolves to maintain an action and then serves as an advocate of a particular position is incapacitated to appraise fairly and objectively the arguments advanced against the view espoused." Gellhorn, Federal Administrative Proceedings (John Hopkins 1941) P. 18.

having served as Board Attorney in a complaint proceeding involving the same employer.

Apparently, however, such division of duties as is required by the Act and Rules and Regulations promulgated by the Board itself, is not complied with by the Board and is not looked upon as a serious violation. This is brought out by the decision in the case of *H & M Manufacturing Co., Inc.*, 87 NLRB 1373, Note 4, where the evidence showed that an employee of the National Labor Relations Board, took a leave of absence and contrary to the Board's regulations, appeared as a representative of the Union at a hearing before the Trial Examiner. The Board in its decision made light of this flagrant violation of the Act by stating that since no objection was made at the hearing to the presence of the employee of the National Labor Relations Board as the representative of the Union, the employer was not prejudiced. Although the Board disapproved of this practice of its employee, it nevertheless allowed the decision to stand undisturbed.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari, should be granted.

Respectfully submitted,

EDWARD D. BOLTON,
Counsel for Petitioners.

WILLIAM J. CORCORAN,
Attorney for Local 15C, International Union of Operating Engineers, A. F. L., Petitioner.

HAROLD L. LUXEMBERG,
Attorney for United Hoisting Co., Inc., Petitioner.

11

NDIX A.

APPENDIX

TUTES.

STATUTES

of the National Labor Rela-

The relevant provisions of tat. 136, 29 U. S. C. Supp. I,
tions Act, as amended (61 Stat. llows:
Sec. 151, *et seq.*), are as follow

NT RELATIONS ACT.

LABOR MANAGEMENT R

be a General Counsel of the

Sec. 3, (d) There shall be ed by the President, by and
Board who shall be appointed ite, for a term of four years.
with the consent of the Senate, Board shall exercise general
The General Counsel of the Boys employed by the Board
supervision over all attorneys and legal assistants to Board
(other than trial examiners and icers and employees in the
members) and over the office ve final authority, on behalf
regional offices. He shall have the investigation of charges
of the Board in respect of the nder Section 10, and in re-
and issuance of complaints und such complaints before the
spect of the prosecution of su other duties as the Board
Board, and shall have such o provided by law.
may prescribe or as may be pr

of the Board and the Gen-

Sec. 4. (a) Each member o ll receive a salary of $12,000
eral Counsel of the Board shall reappointment, and shall not
a year, shall be eligible for rea s, vocation, or employment.
engage in any other business, xecutive secretary, and such
The Board shall appoint an exe egional directors, and such
attorneys, examiners, and reg om time to time find neces-
other employees as it may fro nce of its duties. The Board
sary for the proper performanc s for the purpose of review-
may not employ any attorneys r preparing drafts of opin-
ing transcripts of hearings or y employed for assignment
ions except that any attorney

as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

ADMINISTRATIVE PROCEDURE ACT (60 Stat. 237, 240, 5 U. S. C. 1001, 1004 (c).

Section 5 (c) which in relevant part provides as follows:

> "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not * * * be applicable in any manner to the agency or any member or members of the body comprising the agency."

RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD:

Rules 201.2 and 201.3 (13 Fed. Reg. 3090) are as follows:

Sec. 201.2 *The General Counsel.*—(a) "The General Counsel of the Board derives specific authority for his functions from the provisions of the Labor-Management Relations Act—1947. In addition, he derives certain other authority by delegation from the Board (13 F. R. 654). Under the Act the General Counsel is charged with the functions of exercising general supervision over attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He has also final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board."

Sec. 201.3 (c) *Legal Assistants.* "Each of the Five Board members has a small staff of attorneys under the general direction of a Chief Legal Assistant, to assist him in reviewing transcripts of hearings and preparing drafts of opinions."

Sec. 101.10 (29 CFR 42) *Hearings.*—"Except in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated. A duly designated trial examiner presides over the hearing.* The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint * * *."

*Formerly "a Trial Examiner designated by the Chief Trial Examiner and sent by the Washington Staff, presides over the hearing." Amended March 1, 1951, 16 FR 1935.

APPENDIX B

Bulletin No. 69

To: All Regional Directors and December 8, 1949

From: George J. Bott, Associate Ge rs-In-Charge

Subject: Training Program for Boa Counsel

The Board and the General Cou egal Assistants institute a program of field traini have agreed to Assistants. or Board Legal

This program, to begin immedia June 30, 1950, involves assignment and to run to sistants for thirty to sixty day detail oard Legal As- for purposes of becoming acquainted Regional Offices erations and procedures. In order t grass root op- members to achieve a well-rounded able these staff Office operations, they should be assi re of Regional Examiners or Attorneys conducting to assist Field vestigations, elections, settlement ne ed types of in- forcement. They should also be perm ations, and en- ing officers in representation cases and to sit as hear- case hearings. Definite assignment attend complaint been prepared but each Regional Offic dules have not advance when assignments are made. ill be notified in

The travel and per diem expenses Legal Assistants will be charged to a special project a efined in Memo- randum M-274 date October 29, 1948. The title of the project will be Legal istants Training Program, "LATP" for short. All ob ation documents and vouchers prepared for Legal As tants should be marked with this identification in orde hat the Regional Office allotment account will not be ch ged, and also to enable the Fiscal Section to figure the t of the training program. Inasmuch as the details of is program are being controlled from Washington, the itional informa- tion called for in Section II-E-5 of M norandum M-274 need not be furnished.

G. J. B.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	17
Appendix	18

CITATIONS

Cases:

Fay v. *Douds*, 172 F. 2d 720	11
H & H Manufacturing Company, Inc., 87 NLRB 1373	7
Haleston Drug Stores, Inc. v. *National Labor Relations Board*, 187 F. 2d 418, certiorari denied, 342 U. S. 815	7
National Electric Products Corp., 80 NLRB 995	7
National Labor Relations Board v. *Botany Worsted Mills, Inc.*, 106 F. 2d 263	12
National Labor Relations Board v. *Donnelly Garment Company*, 330 U. S. 219	11
National Labor Relations Board v. *Greensboro Coca Cola Company*, 180 F. 2d 840	11
National Labor Relations Board v. *Kanmak Mills, Inc.*, C. A. 3, No. 10555, order dated October 26, 1951 (unreported)	15, 16
Pure Oil Company, 74 NLRB 1382	7
United States v. *Morgan*, 313 U.S. 409	11
United States v. *Pierce Auto Lines*, 327 U. S. 515	10

Statutes:

Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*):	
Section 5 (e)	8, 12, 13, 14, 19
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):	
Section 3 (d)	7, 8, 18
Section 4 (a)	9, 18

Statutes—Continued

	Page
Rules and Regulations of the National Labor Relations Board (13 Fed. Reg. 3090, 5652):	
Section 201.2	5, 20
Section 201.3	5, 20
Section 202.10 (now designated 101.10, 29 C.F.R., p. 42)	5, 20
Section 101.12 (29 C.F.R., p. 43)	15
Miscellaneous:	
Attorney General's Manual on the Administrative Procedure Act, pp. 54, n. 6, 54-58 (1947)	14
H. R. 1203, 79th Cong., 1st Sess., Sec. 5 (c) (S. Doc. No. 248, 79th Cong., 2d Sess., 157)	13
N.L.R.B. Bulletin No. 69, "Training Program for Board Legal Assistants"	5, 10
S. 7 (revised), 79th Cong., 1st Sess., Sec. 5 (c), in S. Doc. No. 248, 79th Cong., 2d Sess., 24	13

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 462

UNITED HOISTING CO., INC., AND LOCAL NO. 15C INTERNATIONAL UNION OF OPERATING ENGINEERS, A.F.L., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R.A. 68-75)[1] is reported at 198 F. 2d 465. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B.A. 79a-127a) are reported at 92 NLRB 1642.

[1] "R.A." refers to petitioners' (respondents below) Appendix to which has been added the opinion and decree of the court below; "B.A." refers to the Board's Appendix.

JURISDICTION

The decree of the court below was entered on September 2, 1952 (R.A. 76-83). The petition for writ of certiorari was filed on November 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and under Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the employment of an attorney by the National Labor Relations Board as a legal assistant to a Board member to aid the member in carrying out his adjudicatory functions precludes assignment of that attorney for a period of training to the staff of the General Counsel to act in the latter's behalf and under his direction in the prosecution of cases before the Board.

2. Whether the National Labor Relations Board is precluded from exercising its adjudicatory function in a case coming before it merely because a legal assistant to one of its members, who had been assigned temporarily to the staff of the General Counsel, participated as one of the counsel in prosecuting the case.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, *et seq.*) are set forth in the Appendix, *infra*, pp. 18-21.

STATEMENT

In its decision and order, affirmed and enforced by the court below, the Board found that the Company and the Union, petitioners herein, had engaged in certain unfair labor practices, and, pursuant to such findings, entered appropriate remedial orders (B.A. 93a-94a, 97a-98a; 118a-124a). Inasmuch as the petition for a writ of certiorari calls into question only the propriety of the participation of Melvin J. Welles, as counsel in the prosecution of this case before the Board, the statement herein will be restricted to the facts pertinent to that issue.

Upon complaint issued March 9, 1950 (B.A. 13a), a hearing was held before a trial examiner on April 17, 1950, and from April 27 to May 1, 1950, Melvin J. Welles participated as co-counsel for the General Counsel in the prosecution of the case (B.A. 33a, 82a). The trial examiner issued his intermediate report and recommended order on July 13, 1950 (B.A. 110a) and the Union filed its initial exceptions to the report and order on August 10, 1950. On January 26, 1951, the Board entered its decision and order (B.A. 125a).

After the Union had filed its initial exceptions, an exchange of correspondence took place between the Union's counsel and the Executive Secretary of the Board (R.A. 56a-57a).[2] By letter dated Sep-

[2] This correspondence, set forth in the appendix printed by petitioners, is not part of the record in this case. Petitioners did not avail themselves of Section 10(e) of the Act by which a court is empowered, upon request, to grant leave to adduce additional evidence before the Board if, in the court's opinion,

tember 1, 1950, Union counsel wrote the Executive Secretary that (R. 57a):

> During the past week it has come to my attention that said Melvin J. Welles, Esq., is on the staff of the Board as Law Clerk to one of the members and that he held this position at the time he tried this case on behalf of the General Counsel's office. I would appreciate your advising me if this fact is so, namely, that Mr. Welles, is designated as part of the staff of the National Labor Relations Board at the time he tried this case. If such is the fact, then I desire to obtain leave to file a supplemental Bill of Exceptions to the said Intermediate Report, based upon the improper designations of trial counsel, one who is serving as an attache with the National Labor Relations Board.

On September 5, 1950, in reply, the Executive Secretary wrote that (R. 56a):

> Mr. Melvin J. Welles is employed as legal assistant to one of the Board members and has been so employed since 1947. During the period March 27, 1950 to May 1, 1950, Mr. Welles was detailed to the New York Regional Office of the Board. The purpose of this detail was to acquaint legal assistants to the Board members with field practice and thus render better service to parties coming before the Board be-

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the additional evidence is material and there are reasonable grounds for the failure earlier to adduce it before the Board. However, since this objection to considering the correspondence was not interposed in the court below, it is not urged here.

cause of a fuller knowledge of their problems.[3]

If you desire to file a supplemental Bill of Exceptions based upon Mr. Welles' detail to the New York Office during the hearing in the United Hoisting matter, you may file such Bill of Exceptions by September 18.

On September 11, 1950 the Union filed supplemental exceptions, in which the Company subsequently joined, stating

> The Respondent Union respectfully excepts to the Findings of Fact, Conclusions of Law, and Recommended Order of the Trial Examiner dated July 1950 on the ground that the hearing had before the Trial Examiner was conducted by ALVIN J. WELLES, Esq., who, at the time of said hearing, was a law assistant to one of the Board members and who at the time of said hearing was not legally appointed to the staff of the General Counsel, who alone, is authorized under the Act to prosecute complaints based upon violations of said Act.

The Union cited in support of its exception Section 3 (d) and 4 (a) of the National Labor Relations Act, as amended, and Rules 201.2, 201.3, and 202.10 of the Board's Rules and Regulations.[4]

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[3] N.L.R.B. Bulletin No. 69 (1950), reproduced on page 18 of the Petition, sets forth the purpose and function of the Training Program for Board Legal Assistants.

[4] Rules 201.2 and 201.3 (13 F.R. 3090) describe the function of the General Counsel and the organization and function of the Board's staff. Rule 202.10 (29 CFR 42), now designated 101.10 (13 F.R. 5652), describes conduct of a hearing. The text of these rules is set forth in the Appendix, pp. 20-21.

In its decision issued on January 26, 1951, the Board rejected the Union's contention, explaining that (B.A. 115a, n. 1):

> The Respondents have excepted to the Intermediate Report on the ground that the General Counsel's case was presented by a legal assistant to one of the Board Members. We find no merit in this exception as, at the time of the hearing, the legal assistant had been transferred to the staff of the General Counsel in the Regional Office, and was under the general supervision of the General Counsel, as required by Section 3 (d) of the Act.

On January 9, 1952, the Board amended its decision on the issue by adding the further administrative notation that the legal assistant "at no time thereafter [i.e., after the trial] participated, advised, or assisted in the decision in this case" (B.A. 127a).

The court below, in affirming the Board's findings and enforcing its order, addressed itself, *inter alia*, to the Union's contention that the assignment of a legal assistant to a Board Member to prosecute this case violated the Act. Setting forth the Board's holding, the court said (R.A. 74):

> Clearly there was no violation of the Act by the Board in this incident. During his training period with the General Counsel Mr. Welles had been expressly divorced from his work with the Board. He was completely under the direction of the General Counsel. Neither in fact nor in purpose was there any combination of judicial and prosecuting func-

tions. In a laudable effort to give their assistants a rounded out experience so that they would be able to render better service to parties coming before the Board, the latter body arranged for the sort of detached trial assignment under the General Counsel which Mr. Welles was given in this matter. In so doing the Board functioned with the highest sense of responsibility for its obligations under the Act.

ARGUMENT

1. Section 3 (d) of the National Labor Relations Act, as amended, vests in the General Counsel of the Board exclusive power to investigate and prosecute unfair labor practice cases and commits to the Board itself sole authority to adjudicate them. [5]

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[5] The very cases relied upon by petitioners (Pet. 9-10) to establish their claim that the Board does not "take seriously the mandate of Congress" prescribing the separation of functions establish, so far as relevant at all, quite the contrary. See *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C.A. 9), certiorari denied, 342 U.S. 815. In *National Electric Products Corp.*, 80 NLRB 995, the trial examiner, Robert N. Denham, had been appointed by the President as General Counsel of the Board prior to the issuance of the intermediate report. The Board held that the appointment as General Counsel vested Mr. Denham with the statutory responsibility for the prosecution of that as well as all other cases before the Board, and that hence he could no longer under the statutory scheme function in the adjudicatory role of trial examiner. *In Pure Oil Company*, 74 NLRB 1382, n. 1, the Board held that a hearing officer in a representation proceeding was not disqualified because he had acted as prosecutor in an earlier unfair labor practice proceeding. The Board there noted that in a representation case, a non-adversary proceeding, the hearing officer does not adjudicate but merely reports the facts for the Board's decision. *H. & H. Manufacturing Company, Inc.*, 87 NLRB 1373, n. 3, in no way involves a commingling of prosecuting and judicial functions and hence is completely inapposite here.

Petitioners make no claim that the Board itself participated in the prosecution of the instant case or that the General Counsel himself participated in its adjudication. Nor is any claim made that a legal assistant acting under the Board's direction participated in the prosecution of a case, or, conversely, that an attorney acting under the General Counsel's direction participated in its decision. The precise contention urged is that an attorney employed as a legal assistant to a Board member is by that very circumstance precluded from assignment to the staff of the General Counsel to work under the latter's supervision in prosecuting cases before the Board, without regard to whether there is a commingling of prosecuting and adjudicating functions in the same, or a factually related, case. We demonstrate below that neither the National Labor Relations Act, as amended, nor Section 5 of the Administrative Procedure Act contemplates or requires such a futile dichotomy. Accordingly, we respectfully submit that in rejecting petitioner's contention the Board and the court below were clearly correct, and that no substantial question warranting review by this Court is presented.

A. In further delineating the scope of authority of the General Counsel *vis-a-vis* the Board, Congress provided in Section 3 (d) of the Act that the "General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers

and employees of the regional offices." Section 4 (a) provides for the employment of attorneys as legal assistants to Board members to aid the latter in carrying out their function of adjudication. Supervision of legal assistants, while they are acting as such, is, of course, vested in the respective Board members.

Against this statutory framework defining the separation of prosecuting and adjudicatory functions, the status of Melvin J. Welles is indisputably established by the record. Thus, as stated in the letter of the Board's Executive Secretary to the Union's counsel (*supra*, pp. 4-5), Welles, who was "employed as a legal assistant to one of the Board members," was assigned for about a month to the New York Regional Office as part of a program "to acquaint legal assistants to Board members with field practice and thus render better service to parties coming before the Board because of a fuller knowledge of their problems." And as stated in the Board's decision (*supra*, p. 6), "at the time of the hearing the legal assistant [Welles] had been transferred to the staff of the General Counsel in the Regional Office and was under the general supervision of the General Counsel, as required by Section 3 (d) of the Act." It is plain, therefore, as the court below found (R.A. 74) that "During his training period with the General Counsel, Mr. Welles had been expressly divorced from his work with the Board. He was completely under the direction of the General Counsel." Under these circumstances, it cannot be properly contended that Welles' par-

ticipation in the prosecution of the instant case violated Section 3 (d) of the Act.[6]

(b) Petitioners raise, by question and specification of error (Pet. pp. 2, 7), although they do not discuss the point, the issue of whether the Board could properly, by amendment of its original decision, make findings as to Welles' status "without adducing additional evidence upon which it bases its findings." The issue thus raised is without substance. The statements made by the Board concerning the status of Welles and the extent of his participation in the instant case were matters of which the Board could properly take "official notice." See *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 529-530. Petitioners did not contend that Welles took any part in the adjudication of the case, and it is plain that petitioners were not prejudiced by the action of the Board in noticing officially a fact peculiarly within its own knowledge, *viz.*, that

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[6] On page 7 of the petition, petitioners suggest that nothing in Bulletin 69 (Set forth in Petitioners' Appendix B, Pet., p. 14) authorized the assignment of legal assistants to the staff of the General Counsel "for the prosecution of trials." This suggestion merely points to a factual issue as to what the Board and the General Counsel had agreed upon in connection with the Training Program for Board Legal Assistants. Obviously, the Board and the General Counsel interpreted their own agreement to permit legal assistants assigned to the staff of the General Counsel to participate in the trial of cases. This is implicit in the finding of the Board that the legal assistant involved in this case was under the general supervision of the General Counsel (B.A. 115a, n., 12a, n.) and in the finding of the court below that the legal assistant was completely divorced from his work with the Board and was completely under the direction of the General Counsel (R.A. 74). It is plain, therefore, that this issue presents no question of law warranting review by this Court.

Welles at no time participated, advised, or assisted in its own decision in this case.

In any event, in the face of the express statutory mandate to the contrary, it is beyond reasonable question that the Board would retain supervision over the work of the legal assistant in the regional office during the period that he was detached from service with the Board, or that the General Counsel would consent to any such arrangement. Where the statutory requirement is clear, where the Board states that the requirement has been observed and nothing to the contrary is indicated, there is no showing made which puts the Board to proof. *National Labor Relations Board* v. *Greensboro Coca Cola Co.*, 180 F. 2d 840, 844-845 (C.A. 4). The presumption of administrative regularity (*ibid.*, and cases there cited; and see *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 229-231; *United States* v. *Morgan*, 313 U.S. 409, 420-422) is not rebutted by mere innuendoes. "Nebulous and declamatory assertions, wholly unspecified, must not stand in the path of an effective discharge of the Board's duties * * *." *Fay* v. *Donds*, 172 F. 2d 720, 725 (C.A. 2). As well could the Board be put to proof of decisional statements that it had reviewed the whole record, or that it had considered exceptions and briefs, or that it had observed the numerous other proprieties touching upon the adjudication of a case before it. The danger to the administrative process of adopting a rule that would require the board to prove by evidence its own regularity of action in every case

should not be lightly cast aside, for, as the Third Circuit long ago observed in *National Labor Relations Board* v. *Botany Worsted Mills, Inc.*, 106 F. 2d 263, 267, "since the litigants before the Labor Board are legion, the evil of harassment * * * is correspondingly multiplied. The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them."

(c). Petitioners' reliance (Pet., pp. 7, 9) on Section 5(c) of the Administrative Procedure Act, *infra*, p. 19, is misplaced. The Board's action in temporarily detaching Welles for service with the Regional Office where he was assigned to prosecute the instant case was plainly not at variance with that Act. Section 5(c) specifically provides that "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, *in that or a factually related case*, participate or advise in the decision * * *" [Italics supplied]. Embodying a policy judicially endorsed prior to its enactment (*National Labor Relations Board* v. *Botany Worsted Mills, Inc., supra*, at 266), that section prohibits an individual who has engaged in the investigation or prosecution "in any case" from participating or advising in the decision "in that or a factually related case." By its terms, therefore, the prohibition is confined entirely to the participation in the decisional process of a case, or one factually related to it, by an individual who has acted in an investigative or prosecutory capacity therein. It contains no prohibition against an individual's

acting in a prosecutory capacity for a given period and in an adjudicatory capacity for a different period, so long as the individual does not perform both functions in the same or a factually related case.

The legislative history of Section 5(c) of the Administrative Procedure Act supports the above interpretation of that Section. As initially proposed in Section 5(c) of H. R. 1203, 79th Cong., 1st sess. (S. Doc. No. 248, 79th Cong., 2d sess., 157), this section could have been read as a complete separation of investigative and prosecutory personnel from adjudicatory personnel, for it originally provided that: "No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings." This absence of explicit confinement of the prohibition to the same or a factually related case was modified by a later version of the section which limited its ban to participating in the decision of the same "or a related case" (S. 7 (revised), 79th Cong., 1st Sess., Sec. 5 (c), in S. Doc. No. 248, 79th Cong., 2d Sess., 24). As finally enacted, the limitation to a "related" case was further modified to confine it to a "factually related" case. Accordingly, the progressive restriction of Section 5 (c) during its legislative evolution makes plain that the "limitation of the prohibition against consultation to those who performed investigative or prosecuting functions 'in that or a factually related case,' should be con-

strued literally." See Attorney General's Manual on the Administrative Procedure Act, p. 54, n. 6 (1947).

Thus, it is clear that an individual who participates in the investigation or prosecution of a case is unavailable to the agency only in the decisional process "in that or a factually related case." Attorney General's Manual on the Administrative Procedure Act, pp. 54-58 (1947). By this means, Congress has assured against the undesirable consequences of permitting one person to perform inconsistent functions in connection with the solution of the same or a related set of facts. At the same time, it has preserved to the pertinent agency the maximum flexibility in utilizing its personnel by permitting the same person to act in an investigative, prosecutory, or adjudicatory, capacity, as it may suit the needs of the agency, so long as the adjudicatory function is not performed by the person who performed either of the other two functions in the same or a factually related case. In short, the statutory separation of duties is on a case-to-case (or case-to-factually related case) basis.

All that happened in this case was that the Board availed itself of the flexibility in the use of personnel, which Section 5 (*c*) of the Administrative Procedure Act permits, to inaugurate for its legal assistants a training program which the court below characterized as "laudable" and as "evincing the highest sense of responsibility for its obligations under the Act" (R. 74). As already noted, the propriety of this action would not be open to ques-

tion even without the Board's assurance that Welles "at no time thereafter [i.e., after the trial] participated or advised in the decision in this case" (*supra*, p. 6). In Section 101.12 of its Statements of Procedure (29 CFR, p. 43), the Board has stated its uniform practice to be that it "does not consult with members of the trial examining staff or with any agent of the General Counsel in the deliberations." Pursuant to its own practice the Board did not in its decisional process in the instant case, consult with Welles who was with respect to that case an agent of the General Counsel (see p. 6, *supra*). Indeed, petitioners have never asserted otherwise. Accordingly, Welles' assignment to prosecute this case was in full compliance with Section 5 (c) of the Administrative Procedure Act, and it involved no violation of the National Labor Relations Act, as amended.

2. Petitioners allege no conflict of decisions on this issue in the courts of appeals, but urge that the court below has itself taken contrary positions on the question. To establish this contrariety, petitioners cite *National Labor Relations Board* v. *Kanmak Mills, Inc.*, C. A. 3, No. 10555, order dated October 26, 1951 (unreported). In that case, unlike the instant case, a motion was made to remand the case to the Board for further findings as to the status of a legal assistant who had been assigned to the staff of General Counsel and who had participated in the prosecution of a case before the Board, and allegations were made that the legal assistant had also participated in the decisional phase of the case. Despite the Board's claim that an

analytical scrutiny of movant's allegations did not raise a triable issue, the court below granted the motion and directed a remand. No opinion accompanied the court's order, but inasmuch as the panel in *Kanmak* was identical with the panel which decided the instant case, it is only fair to assume that the court was of the view that in *Kanmak*, contrary to the Board's claim, an undecided issue of fact was raised by the movant's allegations that the legal assistant had commingled prosecutory and adjudicatory functions. In the instant case such a remand would have been completely inappropriate. No claim was here made that Welles participated in the adjudicatory function in this case, and no motion was made to adduce any evidence on that issue before the Board. In no real sense can the court therefore be regarded as having taken contrary positions in the cases under discussion. Moreover, the very terms of the court's order in *Kanmak*, remanding the case "for the purpose of taking testimony and determining whether [the legal assistant in that case] participated or advised both in functions of investigation or prosecution and in functions of decision in this case contrary to the prohibition of Section 5(c) of the Administrative Procedure Act" constitute an endorsement of the view that interchange of prosecuting and adjudicatory functions by the same employee is permissible so long as no transfer occurs in the same or a factually related case.[7]

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[7] After the foregone was written, the court below handed down its decision on the merits of the *Kanmak* case. In its opinion, dated December 17, 1952, the court, as in the instant case, reaffirmed the view here expressed (slip op., pp. 5-6).

CONCLUSION

The decision of the court below is clearly correct, there are no conflicts of decision, and further review is not warranted. It is respectfully submitted therefore that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.

JOHN R. BENNEY,
Attorney.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

DECEMBER, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Sec. 151, *et seq.*), are as follows:

SEC. 3. (d). There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

SEC. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of $12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney

employed for assignm a legal assistant
to any Board memb for such Board
member review such ripts and prepare
such drafts. No trial ner's report shall
be reviewed, either be after its publica-
tion, by any person han a member of
the Board or his lega tant, and no trial
examiner shall advise sult with the Board
with respect to exce taken to his find-
ings, rulings, or recom tions. The Board
may establish or utiliz regional, local, or
other agencies, and ut uch voluntary and
uncompensated servic may from time to
time be needed. Att s appointed under
this section may, at th tion of the Board,
appear for and repre the Board in any
case in court. Nothi this Act shall be
construed to authorize oard to appoint in-
dividuals for the pur of conciliation or
mediation, or for econ analysis.

The relevant provision he Administrative Procedure Act (60 Stat 7, 5 U.S.C. 1001, *et seq.*), is as follows:

SEC. 5. (c) * * * N ficer, employee, or agent engaged in the brmance of investigative or prosecuting f ions for any agency in any case shall, in tha a factually related case, participate or adv in the decision, recommended decision, or ncy review pursuant to section 8 except as wi ss or counsel in public proceedings. This s ction shall not * * * be applicable in any m er to the agency or any member or member f the body comprising the agency.

The relevant portions of the Rules and Regulations of the National Labor Relations Board (13 Fed. Reg. 3090) are as follows:

SEC. 201.2 *The General Counsel.*—(a) The General Counsel of the Board derives specific authority for his functions from the provisions of the Labor-Management Relations Act, 1947. In addition, he derives certain other authority by delegation from the Board (13 F. R. 654). Under the act, the General Counsel is charged with the functions of exercising general supervision over attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He has also final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board.

SEC. 201.3 (c) *Legal assistants.* Each of the five Board members has a small staff of attorneys, under the general direction of a Chief Legal Assistant, to assist him in reviewing transcripts of hearings and preparing drafts of opinions.

SEC. 101.10 [29 CFR, p. 42] *Hearings.*—(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated. A duly designated trial examiner presides over the hearing. * The Government's case is con-

* Before it was amended on March 1, 1951, this sentence read, as follows: "A trial examiner, designated by the Chief Trial Examiner and sent from the Washington staff, presides over the hearing." See 16 Fed. Reg. 1935.

ducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. * * *

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